(3)

No. 04-5

In The Supreme Court of the United States

THE DOE RUN RESOURCES CORPORATION,
DR ACQUISITION CORPORATION,
and MARVIN K. KAISER,

Petitioners,

vs.

THE HONORABLE MARGARET M. NEILL,
PRESIDING JUDGE, TWENTY-SECOND JUDICIAL
CIRCUIT, CITY OF ST. LOUIS, MISSOURI,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Missouri

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The statement required by United States Supreme Court Rule 29.6 has been provided in the petition for writ of certiorari and remains accurate.

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ARGUMENT

Respondent misrepresents the nature of the controlling law and the opinions below, in an effort to dissuade this Court from considering the Missouri Supreme Court's summary abrogation of Petitioners' state-created rights. Petitioners now briefly address Respondent's meritless arguments in opposition to the petition for writ of certiorari.

I. The Supreme Court Has Jurisdiction to Consider the Petition for Writ of Certiorari.

Respondent initially contests the jurisdiction of this Court to consider the instant petition under 28 U.S.C. § 1257(a). According to Respondent, there is no colorable Constitutional Due Process claim here, because Petitioners' claim was solely predicated on a now-repealed statute and thus there was no state due process right in the first instance. *See* Respondent's Brief at 1-2, 9-12.

Respondent's contention that this Court lacks jurisdiction to consider this petition is without merit. First, contrary to Respondent's assertions, Petitioners' state-created rights are not exclusively based on the statute in question, MO. REV. STAT. § 509.290. Those rights also derive from the abundant case law recognizing Petitioners' right to submit and rely upon post-petition affidavit evidence to contest venue, as well as from the Missouri Rules of Civil Procedure, which reiterate this basic procedural right to submit affidavit evidence in support of motions. *See Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609, 612-613 (Mo. 1965); *Lichterman v. Crockett*, 331 S.W.2d 607, 608-609 (Mo. 1960); *Frank v. Sinclair Ref. Co.*, 256 S.W.2d 793, 795, 799 (Mo. 1953); *State ex rel. Kyger v.*

Koehr, 831 S.W.2d 953, 956 (Mo. App. 1992) (finding pretensive joinder where defendants submitted uncontroverted affidavits in support of their post-petition motions); *Bottger v. Cheek*, 815 S.W.2d 76, 80-81 (Mo. App. 1991) (noting that non-resident can prove the alleged venue facts "are not true and cannot be proven . . . through testimony, affidavits, depositions, interrogatories, requests for admissions, or other evidence"); *Rakestraw v. Norris*, 478 S.W.2d 409, 416 (Mo. App. 1972) (holding that, in the pretensive joinder context, court must consider "the whole record – to the time the motion was heard, at least"); MO. R. CIV. P. 55.28 ("When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties. . . . "). Accordingly, Petitioners clearly have a state-created right which was summarily and arbitrarily denied by the Missouri Supreme Court, thereby giving rise to the instant Constitutional Due Process claim[1] and yielding jurisdiction for this Court over the petition.

Respondent's second premise, that the statute in question was "repealed," is false. First, there is no case that has ever held that MO. REV. STAT. § 509.290 was "repealed" by MO. R. CIV. P. 55.27. The statute remains on

[1] Respondent does not deny that procedural due process and principles of fundamental fairness under the Fourteenth Amendment to the Constitution of the United States require that an individual be given a full and fair opportunity to be heard where one's protectible liberty or property interest is at stake, *see Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917), and that, when a state supreme court denies a civil defendant the opportunity to present evidence in defense of a claim, due process is denied. *See Saunders v. Shaw*, *supra*, 244 U.S. at 320.

the books today and is as applicable today as when it first issued.

Moreover, as Respondent admits, a Missouri civil procedure rule only supersedes a procedural statute "if there is a conflict between [the Missouri Supreme] Court's rules and a statute." Respondent's Brief at 11 (quoting *State ex rel. Union Electric Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995)). Here there is no conflict. MO. R. CIV. P. 55.27 says nothing about the use of affidavit evidence; it neither prohibits nor excludes such evidence. MO. REV. STAT. § 509.290 explicitly permits the submission of such affidavit evidence. Accordingly, the best that can be said about Rule 55.27 is that it supplements § 509.290, rather than repealing it.

Finally, § 509.290's authorization of affidavit evidence is reiterated in MO. R. CIV. P. 55.28, which Respondent totally ignores. Rule 55.28, applying to "Evidence on Motions," states that, "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties. . . ." *See also* Committee Note, MO. R. CIV. P. 55.28 (noting that Rule 55.28 is broader than the prior repealed Rule 55.31(b), "as it allows the use of oral testimony and depositions as well as affidavits."). Accordingly, even assuming *arguendo* that § 509.290 were somehow considered to be "repealed," Petitioners' state-created right to submit affidavit evidence in support of its improper venue motion is clearly founded in Rule 55.28, which restates the rights granted by § 509.290 and the abundant case law cited above. Thus,

Respondent's arguments against jurisdiction are without any foundation.[2]

II. Petitioners Timely and Properly Raised Their Constitutional Due Process Claim Before the Missouri Supreme Court.

Respondent further contends that Petitioners procedurally waived their Constitutional Due Process claim by raising the issue on rehearing, rather than earlier in the case. *See* Respondent's Brief at 5-8. Specifically, Respondent asserts that Petitioners "never mentioned MO. REV. STAT. § 509.290 in any paper filed with any state court," and that it is thus too late for Petitioners to assert a due process violation of a state-created right now. *Id.* at 8. Respondent additionally argues that Petitioners should have raised their due process arguments earlier, when the trial court first denied Petitioners' motion to transfer for improper venue. *Id.* at 7. Respondent's contentions are unsupported.

First, as noted above in Section I, Petitioners' state-created right to submit post-petition affidavit evidence is not based solely on § 509.290, but also derives from the Missouri Rules and case law which repeatedly recognize this right. Moreover, Respondent erroneously claims Petitioners

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[2] Respondent makes an alternative argument that the rights accorded by § 509.290 apply only to motions asserting improper venue and that Petitioners did not file such a motion. *See* Respondent's Brief at 9-10. In fact, Petitioners' motion below was a motion to transfer for improper venue. App. 58. Moreover, Petitioners' state-created right to submit affidavit evidence, as stated in MO. R. CIV. P. 55.28, applies to *all* motions, and is not limited to the context of improper venue. Thus, Respondent's arguments in this regard should be disregarded.

never cited the statute in question to the Missouri Supreme Court. In fact, Petitioners quoted the statute at length in their Motion for Rehearing and discussed the Missouri Supreme Court's own citation of that statute as justification for the submission of post-petition affidavit evidence. App. 46-47.

Petitioners' raising of the Constitutional Due Process issue in its Motion for Rehearing was well-justified, as the Missouri Supreme Court suddenly and surprisingly reversed a long-established course of accepting post-petition affidavits. Contrary to Respondent's contention, the Missouri Supreme Court did not follow "settled Missouri law," Respondent's Brief at 7, but rather ignored the multitude of cases permitting the submission of post-petition affidavits. *See Glick v. Ballentine*, *supra*, 396 S.W.2d at 612-613; *Lichterman v. Crockett*, *supra*, 331 S.W.2d at 608-609; *Frank v. Sinclair, supra*, 256 S.W.2d at 795, 799; *Kyger v. Koehr*, *supra*, 831 S.W.2d at 956; *Bottger v. Cheek*, *supra*, 815 S.W.2d at 80-81; *Rakestraw v. Norris*, *supra*, 478 S.W.2d at 416. This surprising reversal alone justifies raising the issue on rehearing. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n. 9 (1980). Additionally, there was no suggestion below that the trial court had wholly disregarded the affidavits on the sole basis that they were submitted after the amended petition was filed; the trial court merely discussed the affidavits and summarily concluded that the information available to the plaintiffs was sufficient to support a realistic belief that a valid claim against Petitioner Marvin Kaiser existed under Missouri law. App. 60, 63. Petitioners could not glean from the trial court's order that it was disregarding post-petition affidavit evidence, nor does Respondent suggest this is what the order

means. Accordingly, Petitioners' raising of the due process issue on rehearing was timely and proper.

III. The Missouri Supreme Court Summarily Disregarded Petitioners' Timely Affidavits and Their State-Created Right to Rely Upon Such Affidavits, and Thus Abrogated Petitioners' Constitutional Due Process Rights.

Respondent next suggests that "[t]he Missouri Supreme Court decision does not deny Petitioners the opportunity to present post-petition affidavits nor does it prohibit a court from considering those affidavits." Respondent's Brief at 8. Respondent further asserts that the Missouri Supreme Court actually considered the content of Petitioners' post-petition affidavits and "deemed them insufficient to rebut Plaintiffs' venue allegations." *Id.* at 9. Respondent's position finds no support in the record or the law.

In its opinion, the Missouri Supreme Court explicitly held that the "affidavits were not made until after the plaintiffs filed their petition, and, as such, were not among the information available at the time the petition was filed." App. 7 (internal quotations omitted). The Missouri Supreme Court further stated that "the information available to the plaintiffs at the time the petition was filed supported a realistic belief that a valid claim against Mr. Kaiser exists under Missouri law." *Id.* Given the Missouri Supreme Court's explicit finding that the affidavits were not to be considered in the first instance as post-petition evidence, Respondent cannot reasonably suggest that the affidavits were actually considered by the Court.

The test under Missouri law in a pretensive joinder case is not what Plaintiffs actually knew at the time of filing suit, but what information was reasonably available to them. *See State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 825 (Mo. banc 1998). As Petitioners demonstrated, the facts in the affidavits submitted here were available to Plaintiffs' counsel when they sued Petitioner Kaiser. App. 49-51. The affidavits were proper under settled Missouri law, and the Missouri Supreme Court's holding to the contrary denied due process.

Respondent's argument that the Missouri Supreme Court's holding does not deny Petitioners the opportunity to present post-petition affidavit evidence is fallacious. Granting a defendant the right to present evidence that the court will *never* consider is equivalent to denying that same defendant the right to present the evidence in the first instance. The Missouri Supreme Court decision creates this "hollow" right and should be rejected as a denial of Constitutional Due Process. *See Peck v. Jenness*, 48 U.S. 612, 623 (1849) ("A legal right without a remedy would be an anomaly in the law.").

IV. Review of the Missouri Supreme Court Decision Is Necessary to Resolve a Conflict with Supreme Court Precedent and to Address an Issue of Exceptional Importance.

Respondent lastly argues that civil venue issues are unimportant and do not warrant the protection of the Due Process Clause or the consideration of this Court. *See* Respondent's Brief at 13-15. Respondent is in error.

First, there is no question in Missouri that civil venue rights are valuable and worthy of protection. *See Lichterman*

v. Crockett, *supra*, 331 S.W.2d at 608 (noting "the valuable rights conferred upon litigants" by Missouri venue laws and further stating that it "would be a very dangerous doctrine" and "one utterly destructive" of litigants' valuable venue rights if plaintiffs were permitted to state "paper case[s]" against defendants without providing the opportunity for defendants to rebut those allegations through post-petition affidavits). This Court itself has recognized that venue has important substantive effects on case outcomes, *see Groppi v. Wisconsin*, 400 U.S. 505, 508, 511 (1971), a recognition that applies in the civil context as well as the criminal realm. Plaintiffs in the case below clearly believed venue was significant, switching their claims from one county to another, after more than six years of litigation, as described by the Missouri Court of Appeals in its opinion. App. 14-17.

More importantly, this is not a case limited to venue issues. It addresses a fundamental right – a party's right to present evidence to a court in support of a viable defense. It is uncontested that denial of a defendant's opportunity to be heard and to present evidence on a material question, even where the right is a creature of state law, operates as a wrongful deprivation of due process. *See Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974); *Saunders v. Shaw*, *supra*, 244 U.S. at 320. That is what happened here, in contravention of this Court's precedent, and it demands correction, for Petitioners' benefit and the benefit of the many civil defendants who follow.

CONCLUSION

For the foregoing reasons and those stated in the petition, Petitioners respectfully request that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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